GOVERNMENT OF MALAYSIA

v.

KPM MODAL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-21-71-97]
5 APRIL 2002

CIVIL PROCEDURE: *Writ of summons - Service - Action against corporation - Rules of the High Court 1980, O. 62 r. 4(1)(a) - Change of business address - Whether writ served at former address constituted good service*

CIVIL PROCEDURE: *Judgment - Setting aside - Action against corporation - Default of appearance - Company shifted premises - Failure of registrar of companies to update change of address - Writ served at former address - Whether constituted good service - Whether judgment entered regularly - Whether provisions of Rules of High Court complied with*

REVENUE LAW: *Income tax - Procedure - Change of address - Whether director general ought to be notified - Income Tax Act 1967, s. 89*

The defendant had their registered office at Jalan Parry. Subsequently, they shifted to Jalan Lima. The defendant was required to pay taxes to the plaintiff for the years of assessment in 1979, 1980, 1983 (additional) and 1985 (additional). When the defendant failed to pay the taxes, a writ of summons was served to the defendant at their previous office at Jalan Parry. The defendant failed to enter appearance. The plaintiff obtained a judgment in default and the defendant was eventually wound up.

The defendant applied to the deputy registrar to set aside the default judgment but the application was turned down. This was an appeal by the defendant against the said decision. It was contended that the writ of summons which was served at the defendant's former address did not amount to good service. In addition, the defendant had submitted the necessary documents in effecting the change of address to the registrar of companies. This being the case, the defendant contended that they were entitled to have the default judgment set aside *ex debito justitiae*.

Held:

[1] The plaintiff had made relevant searches with the registrar of companies and it was found that the defendant's registered address at the relevant time was at Jalan Parry and no where else. The registrar did not communicate the defendant's change of address to the plaintiff. Thus, the blame should rightfully be with the registrar who was not doing its work, and not the plaintiff. (p 227 f)

[2] The law requires the defendant to pay the taxes to the government within 30 days upon receipt of notice of assessment. The defendant was wound up because of their failure to pay those taxes within the specified time. This was the magnitude of the defendant's blatant failure under the Income Tax Act 1967. (p 233 g-h)

[3] The defendant as a tax payer was duty-bound to inform the Director-General of Inland Revenue of the change of its registered address under s. 89 of the Income Tax Act 1967. It is not a defence to argue that the defendant was unaware of the taxes due. It was evidenced that they had paid taxes previously upon receipt of the notice of assessment. (p 235 h)

[4] The defendant knew that they must pay the taxes and their failure to inform the Director-General of their registered address at Jalan Lima must be held against them. (p 236 a)

[Defendant's appeal dismissed with costs.]

Case(s) referred to:

D-G of Inland Revenue v. Teo Tuan Kwee [1998] MSTC 3648 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 ***(refd)***

Government of Malaysia v. Sim Soe Hoe [1990] 1 CLJ 279; [1990] 2 CLJ (Rep) 72 ***(refd)***

Grimshaw v. Dunbar [1953] 1 QB 408 ***(refd)***

Hayman v. Rowlands [1957] 1 All ER 321 ***(refd)***

Hong Leong Finance Bhd v. Pasir Permata Sdn Bhd [1989] 1 CLJ 939; [1989] 1 CLJ (Rep) 598 ***(refd)***

Kerajaan Malaysia v. Abdul Rahim Mohd Aki [1994] 4 BLJ 376 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

L Oppenheim & Co v. Mahomed Haneef [1922] 1 AC 482 ***(refd)***

PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] 24 MLJ 113 ***(dist)***

Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd [1984] 1 CLJ 269; [1984] 2 CLJ (Rep) 470 ***(dist)***

Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd [1985] 1 CLJ 70; [1985] CLJ (Rep) 304 ***(dist)***

Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 ***(dist)***
Tan Tin Swee v. Kangar Properties Sdn Bhd [1990] 2 CLJ 457; [1990] 3 CLJ (Rep) 199 ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***
United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd [2000] 1 CLJ 57 ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 119, 120, 218(2)
Income Tax Act 1967, ss. 2, 89, 103(1), 106(1), (3)
Rules of the High Court 1980**,** O. 2, O. 12 r. 4, O. 13 rr. 7(1)(a), (b), 8, O. 19 r. 9, O. 35 r. 2, O. 42 r. 13, O. 62 r. 4(1)(a)

For the plaintiff - Norzilah Abd Hamid, Legal Officer; Income Tax Department
For the defendant - Daya Nair; M/s Nik Saghir & Ismail

Reported by M Maheswaran

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

On 26 June 1997, the plaintiff filed a writ of summons against the defendant and claimed for a sum of RM6,382,878.90 as tax due and payable for the years of assessments in 1979, 1980, 1983 (additional) and 1985 (additional). On 24 July 1997, the writ of summons was served onto the defendant by leaving it at the defendant's registered office, namely, at Penthouse Oriental Plaza, Jalan Parry, Kuala Lumpur (hereinafter referred to as "Jalan Parry"). O. 62 r. 4(1)(a) of the Rules of the High Court 1980 ("RHC") states that:

> (1) Where an action is against a corporation, the writ may be served:
>
> (a) by leaving a copy of it at the registered office (if any) of the corporation;

and the plaintiff had acted within the requirement of the law. On 8 June 1998, a judgment in default (hereinafter referred to as the "default judgment") was obtained by the plaintiff after the defendant had failed to file a memorandum of appearance and the defence. On 21 August 1998, a copy of the default judgment was served onto the defendant. On 7 April 1999, a notice of demand was sent to the defendant at number 28A, Jalan Lima, Off Jalan Chan Sow Lin, 55200, Kuala Lumpur (hereinafter referred to as "Jalan Lima"). On 24 June 1999, the same notice was also sent to the defendant at Jalan Parry.

On 25 April 2000, a winding-up petition against the defendant had been filed. On 26 July 2000, the defendant had filed an application to set aside the default judgment. On 28 July 2000, the court ordered the defendant to be wound-up. On 22 August 2000, the defendant proceeded to file an application for leave to set aside the default judgment. On 29 November 2000, the application to set aside the default judgment was heard by the deputy registrar who then dismissed the said application on 13 February 2001. Aggrieved by the decision of the deputy registrar, the defendant filed a notice of appeal to the judge in chambers on 15 February 2001 which can be seen in encl. 27.

Issue Of The Day

Was the deputy registrar correct in dismissing the defendant's application to set aside the default judgment that the plaintiff obtained on 8 June 1998?

The Law - A Brief Insight

It is trite law that a judgment in default is not a judgment that is obtained on its merits (*Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32, SC; *L Oppenheim & Co v. Mahomed Haneef* [1922] 1 AC 482, *PC; Grimshaw v. Dunbar* [1953] 1 QB 408 at 416, [1953] 1 All ER 350 at 354-355, CA, per Jenkins LJ; and *Hayman v. Rowlands* [1957] 1 All ER 321, [1957] 1 WLR 317, CA). But nevertheless, a default judgment is still good at law and it is enforceable. No appeal would lie against a default judgment, but the court certainly has the power to set it aside or to vary it or to affirm it (see O. 13 r. 8 of the RHC (judgment in default of appearance), O. 19 r. 9 of the RHC (judgment in default of pleading), and O. 35 r. 2 (judgment in default of appearance at trial)). Where the defendant fails to enter an appearance within the prescribed time as set out in O. 12 r. 4 of the RHC, the plaintiff is certainly entitled to enter a default judgment against the defendant. As the law now stands, a default judgment shall not be entered against the defendant unless:

(1) the writ has been duly served on the defendant; it stands to reason that the purpose of serving a writ and the statement of claim is simply to alert the defendant by making him aware that legal proceedings have been instituted against him and that he is required within the time as stipulated in the writ to enter an appearance and to make his defence and that in default thereof the plaintiff is entitled to enter judgment and proceed to execute the default judgment (see the decision of Siti Norma Yaakob J (now FCJ) in *Hong Leong Finance Bhd v. Pasir Permata Sdn Bhd* [1989] 1 CLJ 939; [1989] 1 CLJ (Rep) 598).

(2) the defendant has failed to enter an appearance within the prescribed time as set out in O. 12 r. 4 of the RHC and, according to the case of *Tan Tin Swee v. Kangar Properties Sdn Bhd* [1990] 2 CLJ 457; [1990] 3 CLJ (Rep) 199, a default judgment entered before the time limited to enter an appearance has lapsed is a nullity and should be set aside *ex debito justitiae*.

(3) the plaintiff must, in compliance with O. 13 r. 7(1)(a) of the RHC, obtain from the registry a certificate of non-appearance in the prescribed form.

(4) the plaintiff must, in compliance with O. 13 r. 7(1)(b) of the RHC, file an affidavit proving due service of the writ and according to the case of *Tan Tin Swee v. Kangar Properties Sdn Bhd (supra)*, an affidavit of service which does not state the day of the week when the writ was served on the defendant is a mere irregularity which is curable under O. 2 of the RHC.

So much for the law. I will now go to the heart of the matter.

Arguments Of The Parties And The Assessment Of The Evidence

It was argued on behalf of the plaintiff that the decision of the deputy registrar was correct in law and that this court should dismiss the appeal in encl. 27 with costs. A contrary submission was made by the defendant.

The plaintiff's stand was quite simple: that it had taken the necessary steps as required by the RHC and that the default judgment was regularly obtained. Three searches were made on behalf of the plaintiff with the registrar of companies (see exhs. "MR1", "MR2" and "MR3" annexed to an affidavit in reply in encl. 19) and these searches showed the registered office of the defendant was at Jalan Parry while the business address of the defendant was at Jalan Lima. The searches were carried out on 14 May 1997, 2 September 1998 and 17 September 1998.

The defendant, on the other hand, argued that the defendant's registered office since 12 September 1989 was at Jalan Lima and that the change of address was effected by the defendant by filing in Form 44 as required under the Companies Act 1965 (see the averment in the affidavit in reply in encl. 21 at para. 5 annexing an exhibit marked as "AS4").

The defendant submitted that on 24 July 1997 when the writ of summons was served on the defendant at Jalan Parry, it did not constitute a good service because the defendant's registered office had been changed to Jalan Lima since 12 September 1989. Flowing from that it was vigorously argued that service of the writ of summons at the wrong address entitled the defendant to have

the default judgment set aside *ex debito justitiae*. There are quite a number of authorities that were decided in favour of the defendant on a different set of facts and it would be ideal that reference to these authorities would now be made. Rigby J in *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd* [1958] 24 MLJ 113 was of the view that strict compliance with procedure must be adhered to when serving the writ of summons. At p. 115 to p. 116 of the report, his Lordship Rigby J had this to say:

> On the authorities it seems abundantly clear, therefore, that where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court will set aside a judgment obtained by default where the requirements have not been complied with.

Further down the same page, his Lordship Rigby J ruled as follows:

> Upon the authorities I was of the opinion that since the company had not been served with the writ of summons at its registered office the purported service was, therefore, bad and all proceedings thereafter were bad and the judgment obtained in default of appearance was accordingly a nullity.

Factually speaking, *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd (supra)* was not an income tax case and it did not relate to tax that was due and payable for the relevant assessment years. It was in fact a case where the plaintiff demanded payment of a sum of money allegedly due to them. In that case, the defendants sought to set aside a final judgment entered by the plaintiffs in default of the defendants' appearance. The plaintiffs were a company constituted and incorporated in Indonesia, and had places of business in both Singapore and Penang. The defendants were a company incorporated in the Federation of Malaya and, according to the statement of claim, had its principal place at number 144, Beach Street, Penang. Some time in 1954 the plaintiffs entered into an agreement with the defendants whereby the defendants were to act as their agents on a commission basis. In May 1956, the plaintiffs after obtaining particulars of the defendants from the registrar of companies including the statement that the situation of the registered office of the defendants was at number 144, Beach Street, Penang, addressed a notice of action to the defendants demanding payment of a sum of $116,409.84 allegedly due to them and threatening legal proceedings if the money was not paid within a stipulated period. The notice was returned with a covering letter addressed at number 144, Beach Street and signed by the managing director of Joo Seang & Co Ltd stating, *inter alia*, that the notice was "apparently

meant for M/s Joo Seang & Co." When the notice was again returned to them, the defendants denied the existence of any agreement between themselves or any representative acting on their behalf and the plaintiffs. Subsequently the plaintiffs took out a writ of summons and on the strength of the information already received from the registrar of companies the writ was served and what had been stated to be the company's registered office at number 144, Beach Street. The summons was returned to the plaintiffs' solicitors by Joo Seang & Co of that address stating that Joo Seang & Co Ltd were "no more at the above address having since removed." The plaintiffs, after confirmation by the registrar of companies that the defendants' registered office was at number 144, Beach Street, obtained final judgment against them in default of appearance in the sum of $116,409,84 and costs. On 1 July 1957 the plaintiffs' solicitors again wrote to the registrar of companies requesting particulars of the defendants' firm and in reply the registrar, for the first time, stated that the: "Situation of registered office – 146, Beach Street Penang." Subsequently the registrar disclosed that: "When I advised you on 9 April 1957 that the address was 144 Beach Street, Penang it was not noticed at that time on 7 February 1955 the company did in fact give notice to this registry that its registered office was at 146 Beach Street, Penang since 1 February 1955." On 22 July 1957 the defendants applied by summons in chambers for the judgment obtained in default of appearance to be set aside. An affidavit was filed in support of that application by the managing director of the company which, *inter alia*, alleged that he had no knowledge of the existence of the suit until 13 July 1957 when he was handed a copy of the judgment obtained in default of appearance by the process server of the plaintiff's solicitors. The court then set aside the judgment obtained in default of appearance. Here, in the present appeal, the registrar of companies did not communicate by letter to the plaintiff to say that the defendant's registered office had been changed to Jalan Lima from Jalan Parry unlike the case of *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd (supra)*. Here too the plaintiff had made the relevant searches with the registrar of companies and these searches showed that the registered office of the defendant, at the relevant time, to be at Jalan Parry and no where else.

Next, it would be the case of *Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd* [1984] 1 CLJ 269; [1984] 2 CLJ (Rep) 470 and the facts may be stated as follows. There the appellants had purported to serve a writ on 1 July 1982 on the respondent company at an address which they believed to be the registered address of the company. The respondent company had in fact changed its registered address and the change had been notified to the registrar of companies on 20 February 1982. The notification of change was not

however entered into the register until 24 September 1982. When no appearance was entered to the writ, the appellants obtained judgment in default and execution proceedings were taken. The respondents when they came to know of the writ subsequently applied to have the writ set aside. The learned trial judge in the person of VC George J (as he then was) gave judgment for the respondents and the appellants appealed. The Federal Court (Salleh Abas LP, Wan Suleiman & Seah FJJ) dismissed the appeal and held that the effective date of the change of the registered address was on the date of the lodgment of the notice to the registrar of companies. The Federal Court too held that the learned trial judge was correct in holding that there had been no good service of the writ and in setting aside the judgment. VC George J (as he then was) delivering the judgment of the court of first instance had this to say at p. 270 (pp. 470-471) of the report:

> The provisions for the service of a writ against a corporation is found in Order 62 rule 4. In the instant case the plaintiffs sought to effect the service of the writ pursuant to rule 4(1)(a), on the 1st July 1982, by leaving a copy of it at no: 42-2A City Tower, Jalan Alor, Kuala Lumpur, thought by the plaintiffs to be the registered office of the defendants.
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> It turned out that unknown to the plaintiffs the defendants had changed the situation of its registered office from no: 42-2A City Tower to Room 1201, 12th Floor, Komplek Selangor on February 8, 1982. Pursuant to the requirements of section 120 of the Companies Act the company had duly notified the Registrar of Companies of the change by lodging with the Registrar on February 24, 1982 the requisite Form 44 in which the particulars of the change of the registered office was set out. It was said that the registration of this change was not effected until September 24, 1982.

Continuing at p. 270 (p. 471) of the report, his Lordship VC George J (as he then was) rounded up the matter by saying:

> On July 1, 1982 No: 42-2A City Tower was not the registered office of the company and accordingly leaving a copy of the writ at that address was not good service. And accordingly the defendants were entitled to have the default judgment set aside *ex debito justitiae*.

In the Federal Court, Wan Suleiman FJ delivering the judgment of the court had this to say at p. 72 (p. 306) of the report:

> Mr. Wong for the respondents maintains that the date of the lodgement of the section 120 notice to the Registrar should be the effective date. We are inclined to agree with him. Whether the particulars are in due course (and as in this case very much later), entered into any register, is in our view irrelevant. Once the notice of change under section 120 has been lodged, anyone who wishes

to ensure that a writ is served at the proper address can on payment of the prescribed fee avail himself of his right under section 11(2)(a) of the Act to 'inspect any document filed or lodged with the Registrar'.

We would dismiss the appeal with costs.

Just like the case of *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd (supra)*, the case of *Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd (supra)* had the same distinguishing feature. It was this. That that case was not concerned about the issue of tax being due and payable under the Income Tax Act 1967 (Revised 1971) (Act 53). From the judgment of VC George J (as he then was) in *Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd*, it was apparent that the plaintiffs there thought that the registered office of the defendants was at number 42-2A, City Tower, Jalan Alor, Kuala Lumpur and unknown to the plaintiffs, the defendants had changed its address. Whereas here, in the present appeal, the plaintiff made three searches with the registrar of companies before serving the writ of summons to the defendant at its registered office at Jalan Parry on 24 July 1997.

It is interesting to note that ss. 119 and 120 of the Companies Act 1965 were alluded to in the case of *Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd.* Basically s. 119 of the Companies Act 1965 requires a company from the day on which it begins to carry on business to have a registered office within Malaysia to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than three hours during ordinary business hours on each day, Saturdays, weekly and public holidays excepted. Section 120 of the Companies Act 1965, on the other hand, provides that notice in the prescribed form of the situation of the registered office, the days and hours during which it is open and accessible to the public, and of any change therein shall be lodged with the Registrar within one month after the date of incorporation or of any such change, as the case may be, but no notice of the days and hours during which the office is open and accessible to the public shall be required if the office is open for at least five hours during ordinary business hours on each day, Saturdays, weekly and public holidays excepted. In short, s. 120 of the Companies Act 1965 enacts that the registrar has to be notified of the situation of the registered office and of any change of the situation of such office within one month after the date of incorporation of the company or of any such change as the case may be. Flowing from these two statutory provisions in the Companies Act 1965 an argument was advanced on behalf of the defendant that the defendant had complied with the law and had filed the requisite Form 44 evidencing the change of the defendant's registered office to Jalan Lima on 12 September 1989. In rebuttal thereto, the plaintiff laid stress and

emphasised that the three searches that were made with the registrar of companies all showed the registered office of the defendant to be at Jalan Parry. The plaintiff rightly put the blame on the registrar of companies who was not doing its work.

I will now refer to the case of *United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57, a decision of the Federal Court. In that case the appellant had sought to wind-up the respondent company. Following a search made at the registrar of companies ('the registrar'), on 26 February 1992 the appellant served the winding-up petition ('the petition') at the respondent's registered address at number 48, Rangoon Road, Penang. On 17 January 1994 the High Court made a default order winding-up the respondent. The respondent, however, applied to set aside the order on the ground that the notice of demand ('the notice') was ambiguous and bad in law. The learned judge, relying on the principles in bankruptcy cases, and adopting a strict construction of the notice, ruled that the notice was defective and so set aside the default order. The appellant appealed and argued before the Court of Appeal that the learned judge was wrong in construing the notice strictly. The respondent in the meantime raised a new point of argument, contending that the default order was bad as service of the petition was irregular. According to the affidavit affirmed by the respondent's secretary, number 48, Rangoon Road, Penang was the respondent's old address, and that as of April 1991 the respondent had moved to its new address at number 731, Dato Keramat Road, Penang. The secretary also affirmed that the notice of the change of address was lodged by the respondent with the registrar on 1 February 1992.

The Court of Appeal was of the view that it was improper for the trial judge to have applied bankruptcy principles to the winding-up case before him and took issue with the strict approach adopted by the judge in construing the notice. According to the Court of Appeal, the notice, in order to be valid, must comply with the requirements of s. 218(2) of the Companies Act 1965. The Court of Appeal was of the view that the service of the petition was bad in law because it was served on the old registered address of the respondent, and on that ground disallowed the appellant's appeal.

Being dissatisfied, they appealed to the Federal Court. Now, before the Federal Court, in regard to the official search at the registrar's office the respondent, *inter alia*, exhibited a photocopy of the receipt issued by the registrar. That photocopy contained indecipherable details and later at the behest of the

Federal Court the official receipt was subsequently produced by the respondent. It turned out that the particulars in the original receipt and the photocopy failed to tally and it also contained serious differences. The respondent did not explain the differences and so the question that arose was whether the respondent was still at the old address when the petition was served so as to render the service of the petition at number 48, Rangoon Road, Penang valid in law. The facts indicated that the respondent had cross-appealed but somehow it had failed to obtain the necessary leave. In view of that, the Federal Court had also to consider the question of whether the cross-appeal should be struck out by the court.

The Federal Court ruled that since no leave to file a cross-appeal was obtained when leave to file the appeal was given on 12 September 1995, the respondent's cross-appeal should be struck out with costs. The Federal Court also ruled that the Court of Appeal was right in ruling that the High Court judge ought not to apply the principles in bankruptcy cases to cases of winding-up for the reasons as set out by the Court of Appeal. In regard to the notice, the Federal Court ruled that the Court of Appeal was right in the views that it took, but, however, the Court of Appeal was wrong in concluding that the service of the petition on 26 February 1992 was bad in law. According to the Federal Court, the differences and discrepancies between the original receipt and the photocopy produced by the respondent at the adjourned hearing showed that, at best, number 731, Dato Keramat Road, Penang was the address of the respondent's secretary and not, in law, the registered office of the respondent when the petition was served. The receipt, clearly, cannot be as regards the respondent. This meant that the respondent was still at the old registered address when the petition was served on 26 February 1992 thereby rendering the service on the respondent to be valid and, consequently, the finding of the Court of Appeal that it was otherwise was set aside.

Again, it must be noted that the case of *United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd (supra)* was not governed by the Income Tax Act 1967 (Revised 1971) (Act 53).

This would be followed by the case of *Syarikat Joo Seng & Anor v. Habib Bank Ltd* [1986] 2 MLJ 129, SC, a decision of the then Supreme Court (Lee Hun Hoe CJ (Borneo), Seah & Syed Agil Barakbah SCJJ). In that case, the respondents had taken out a writ against the appellants claiming a declaration:

(a) that the first appellant had received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount; and

(b) that the second appellant received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount.

The appellants entered a conditional appearance and applied to strike out both the writ and the statement of claim. The application was dismissed on 4 June 1984 and the notice of appeal was filed on 29 June 1984. However, on 22 June 1984 the respondents without obtaining leave of the court or a judge entered a judgment in default of defence against the appellants. The appellants applied to set aside the default judgment and this was refused by the High Court. The appellants appealed. In allowing the appeal with costs, the then Supreme Court also gave costs at the High Court level to be taxed. The then Supreme Court then set aside the judgment in default of defence and ordered both the appellants to deliver their statement of defence within twenty-one days from the date thereof. Seah SCJ (as he then was) in delivering the judgment of the then Supreme Court had this to say at p. 130 to p. 131 of the report:

> Now, Order 19 rule 9 of the rules of the High Court 1980 gives a discretionary power to the judge in chambers to set aside a default judgment. This discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence (per Lord Atkin in *Evans v. Bartlam* [1937] A.C. 473, 479-480).
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> In *Anlaby & Ors v. Praetorius* [1888] 20 QBD 764 it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. This case was considered by the Privy Council in *MacFoy v. United Africa Co. Ltd* [1962] A.C. 152 and by the Court of Appeal in *White v. Weston* [1968] 2 WLR 1459, [1968] 2 All ER 842. We would adopt this guideline in exercising the discretion contained in Order 19 rule 9. To quote Lord Guest in *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228, 229, 'The Rules of Court must *prima facie* be obeyed.' A *fortiori*, when the rules regulate how a default judgment may be obtained or given. There are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution and possibly bankruptcy proceedings.

Once again the case of *Syarikat Joo Seng & Anor v. Habib Bank Ltd (supra)* was not decided in the context of the Income Tax Act 1967 (Revised 1971) (Act 53).

I pause here for a moment. I will now refer to the Income Tax Act 1967 (Revised 1971) (Act 53). In this direction, the proposed statement of defence as seen in exh. "AS4" of the affidavit in encl. 12 did not show that the defendant had a good defence under s. 103(1) of the Income Tax Act 1967 (Revised 1971) (Act 53). That section enacts as follows:

> Subject to the section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed, other than a company to which section 103A applies, be due and payable at the place specified in that notice whether or not that person appeals against the assessment.

Whereas s. 106(1) of the Income Tax Act 1967 (Revised 1971) (Act 53) enacts that:

> Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

And this would be followed by s. 106(3) of the Income Tax Act 1967 (Revised 1971) (Act 53) which states that:

> In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), 103(5), 103(5A), 103A(4), 103A(5), 103A(6), 103A(7), 103A(8) or 103A(9).

Now, all these provisions of the Income Tax Act 1967 (Revised 1971) (Act 53), which must apply to the defendant, have brought the present appeal in encl. 27 far apart from the cases that were alluded to earlier, namely, *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd (supra)*; *Summit Company (M) Sdn Bhd v. Nikko Products (M) Sdn Bhd (supra)*; *United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd (supra)*; and *Syarikat Joo Seng & Anor v. Habib Bank Ltd (supra)*. The present appeal revolved purely on the claim by the plaintiff of the sum of RM6,382,878 which constituted the taxes that were due and payable for the years of assessments in 1979, 1980, 1983 (additional) and 1985 (additional). The law requires the defendant to pay those taxes within thirty days upon receipt of each notice of assessment. But unfortunately the defendant had failed to pay those taxes within the permissible specified time. That being the case, those taxes, under the law, became due and shall be recovered by the Government by way of civil proceedings. The defendant had been wound-up because of its failure to pay those taxes. That was the magnitude of the defendant's blatant failure under the Income Tax Act 1967 (Revised 1971) (Act 53).

It was sought to argue that the defendant had appealed to the Special Commissioners of Income Tax who had then dismissed the said appeal. A case stated was then forwarded to the High Court in 1996 but until now it was submitted that no hearing date has been fixed. The plaintiff pointed out that the defendant had not taken all reasonable steps to move the High Court to fix the hearing date for its appeal. The dilatoriness on the part of the defendant showed their disinterestedness in not proceeding with the case and their delaying tactics in not paying the taxes that were due. This was the tenor of the plaintiff's submissions. That there was an appeal and that taxes were incorrectly assessed were irrelevant considerations and it would not help the defendant at all. In *Government of Malaysia v. Sim Soe Hoe* [1990] 1 CLJ 279; [1990] 2 CLJ (Rep) 72, the court regarded the defendant's plea in his affidavit that the assessment was incorrectly assessed was of no significance having regard to the relevant provisions of the Income Tax Act 1967 (Revised 1971) (Act 53). Chong Siew Fai J (as he then was) delivering the judgment of the court said at p. 281 (p. 75) of the report:

> ... The court will not entertain any plea that the amount of tax sought to be recovered is excessive, or incorrectly assessed or increased.

In *Kerajaan Malaysia v. Abdul Rahim Mohd Aki* [1994] 4 BLJ 376, the High Court was confronted with an application to set aside a default judgment. In that case, the plaintiff sued the defendant to recover debts allegedly due and payable under s. 106(1) of the Income Tax Act 1967. The plaintiff entered judgment in default of appearance and the defendant applied to set aside the judgment. The defendant relied upon the affidavit filed by the plaintiff in bankruptcy proceedings taken against him to show that the judgment was entered for an amount in excess of what was actually due and payable. The defendant contended that the judgment was irregular and that he was entitled *ex debito justitiae* to have it set aside without the need to show any merits. The High Court held that the defendant cannot succeed in his attempt to set aside the default judgment on that ground. It made no difference, according to the High Court, that the evidence of possible excess or error was provided by the plaintiff itself. In an excellent judgment, Abdul Aziz Mohamad J in style said at p. 378 of the report:

> The position of the defendant would merit serious consideration were this to be any other case but a claim under s. 106(1) of the Income Tax Act 1967. But for a claim under s. 106(1) there is s. 106(3) which says:
>
> > In any proceedings under this section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4), (5) or (5A).

> What it means is that in any civil proceedings to recover income tax allegedly due and payable, the Court must close its ears and shut its eyes to any suggestion or indication that the amount claimed is excessive or incorrectly assessed. It has the effect of making the amount claimed conclusively correct and unchallengeable in the civil proceedings to recover it and, consequently, of making the judgment subsequently entered immune from subsequent challenge on the ground that the amount of judgment was excessive or incorrectly assessed. The defendant therefore cannot succeed in his attempt to set aside the default judgment on that ground. I do not think it makes any difference – as learned Counsel for the defendant did argue – that the evidence of possible excess or error was provided by the plaintiff itself.
>
> For that reason I dismiss this appeal with costs.

In adopting the stand that the defendant was not aware of the taxes that were due and payable which stand was clearly set out in the proposed statement of defence in exh. "AS4" of encl. 12, the defendant had adopted a precarious line of defence. In response to the averment in para. 5 of the statement of claim, the defendant admitted that it had paid a sum of RM53,139.45 as tax for the assessment year of 1979 within the period of thirty days. This admission must be viewed against the backdrop that the defendant had denied knowledge of the other taxes that were due and payable. The defendant too, as a taxpayer in this country, challenged the service of the writ of summons that was effected on 24 July 1997 at Jalan Parry. The defendant said that its registered office was at Jalan Lima and not at Jalan Parry. What would be the duty of the defendant as a taxpayer in the context of a change of address under the Income Tax Act 1967 (Revised 1971) (Act 53)? Section 89 of the Income Tax Act 1967 (Revised 1971) (Act 53) imposes a burden on the defendant as a taxpayer. It enacts as follows:

> Every person chargeable to tax who changes his address in Malaysia (being an address furnished by him to the Director General) for another address in Malaysia shall within three months inform the Director General of the change by notice in writing.

And it imposes a duty on the taxpayer to inform the Director General within three months of any change of address by notice in writing. By virtue of s. 2 of the Income Tax Act 1967 (Revised 1971) (Act 53), the designation "Director General" would refer to the Director General of Inland Revenue and, by the same section of the same Act, the word "person" has been defined to include "a company, a body of persons and a corporation sole." In my judgment, as a company and as a taxpayer it was the bounden duty of the defendant to inform the Director General of Inland Revenue of the change of its registered office to Jalan Lima within the prescribed time period bearing in mind that the defendant had admitted that it had paid a sum of RM53,139.45 as tax for

the 1979 year of assessment. The defendant knew that it must pay its taxes and the failure to inform the Director General of Inland Revenue of the change of its registered office to Jalan Lima must be held against the defendant. This would be the striking feature of the present appeal and by all counts it puts it way above those other cases that were alluded to in this judgment.

At any rate it would certainly be difficult for the plaintiff to ensure the correct registered office of the defendant or any taxpayer for that matter unless s. 89 of the Income Tax Act 1967 (Revised 1971) (Act 53) was invoked. Here, the sole reliance from the registrar of companies to ascertain the registered office of the defendant proved to be the best source of information. Three correct and reliable searches were made before the issuance of the writ of summons. These searches showed the correct registered office to be at Jalan Parry.

Under the Income Tax Act 1967 (Revised 1971) (Act 53), a person is said to be chargeable to tax when there is a chargeable income. For a company, like the defendant, the chargeable income is at par and is the same as the total income. Once the chargeable income has been determined, the appropriate tax rates would then be applied to arrive at the income tax liability. Having ascertained and determined the income tax liability, the next step would be to inform the taxpayer. This is usually done by issuing a notice of assessment. After receipt of that notice of assessment, the taxpayer should pay the tax due within thirty days irrespective of whether or not the taxpayer appeals against the said assessment (see s. 103 of the Income Tax Act 1967 (Revised 1971) (Act 53)). Until today, the defendant simply refused to pay those taxes that were due and the defendant was making a concerted attempt to delay the payment on the ground that no date has been fixed by the High Court. Yet the defendant took no effort at all to move the High Court to fix the date for the hearing of the appeal. So the question foremost to pose would be: was the reason for the delay acceptable? I would answer it in the negative. It must be borne in mind that tax is an important source of income for the Government as it will invariably be used to meet the administrative and development expenditures of the country. In *Director General of Inland Revenue v. Teo Tuan Kwee* [1998] MSTC 3,648 especially at p. 3,658, I had occasion to say that:

> The purposes of the taxing Act - referring to the Income Tax Act, 1967 (Revised 1971) Act 53, are wider than those which have been called revenue enactments and they are intended to ensure the systematic collection of revenue on which the prosperity of this country is dependent upon. Taxpayers must pay taxes for that would be the revenue of the country.

In regard to the delay in filing the application to set aside the default judgment, reference to O. 42 r. 13 of the RHC should be made and that rule states that:

> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

In the present appeal, the order of the default judgment was served on the defendant on 21 August 1998 as seen in exh. "MR5" of encl. 21A. Notices of demands dated 7 April 1999 and 24 June 1999 as seen in exhs. "MR6" and "MR7" of encl. 21A were served on the defendant and in these notices too the defendant had been informed of the order of the default judgment. Of pertinence would be the letter from the defendant's counsel dated 10 April 1999 that was addressed to the Inland Revenue Board of Malaysia where the defendant through its counsel acknowledged that tax was due and payable. That letter makes for an interesting reading material and it was worded as follows (see exh. "MR8" of encl. 21A):

> **Demand for Payment to KPM Modal Sdn. Bhd.**
>
> We act for KPM Modal Sdn. Bhd. which has sent us a copy of your Demand for Payment notice dated April 7th 1999.
>
> According to our client, the sum which is the subject of the Demand for Payment notice is the amount of tax payable for Years of Assessment 1978 to 1985. For your information, the assessments in respect of the amount are still under dispute and are presently on appeal to the Kuala Lumpur High Court by way of a case stated. So far, the High Court has not yet fixed the date for the hearing of the said appeal.
>
> We are aware that under the Income Tax Act 1967 the amount assessed is due and payable notwithstanding the appeal. However, in the present case, on behalf of our client, we seek your indulgence to grant our client a stay of execution of the civil suit (judgment) on the grounds that:
>
> (a) under the present economic condition it is difficult for our client to settle the (judgment) sum immediately; and
>
> (b) should you proceed with winding-up action and our client is wound-up, it would be impossible for our client to be reinstated should the tax appeal before the High Court be successful and the assessments are ordered to be discharged.

> In view of the above, it is fair and reasonable for you not to proceed with execution of the (judgment) until the tax appeal before the High Court is settled.
>
> Yours faithfully,
> Sgd. (Illegible).
>
> c.c. client

It can be surmised that the defendant knew about the order of the default judgment and yet it took the defendant some three years to wake up from its deep slumber. The letter in exh. "MR8" of encl. 21A merely sought for a stay of the proceedings and the defendant thought, according to its learned counsel, that that was acceded to. I must at once respond by saying that it was an untenable line of approach. The defendant should file a formal application for a stay and should not relay on that letter to seek solace from its problem bearing in mind that legal action had already been put into motion. On delay, I need to rely on two authorities. One would be the case of *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, where Edgar Joseph Jr FCJ in style said:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made:
>
> (a) with reasonable promptitude, in other words within a reasonable time; and
>
> (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court 1980).

The other would be the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, where Gopal Sri Ram JCA aptly said:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case.

It was submitted on behalf of the plaintiff that that long delay had prejudiced the plaintiff. It was a submission that deserved attention as it had merit. I was satisfied that the delay had indeed prejudiced the plaintiff which was beyond redemption.

Conclusion

For the reasons adumbrated above, I had no choice but to dismiss the appeal in encl. 27 with costs.